**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

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| Home Basket Company, LLC, d/b/a Greenbrier Basket Company,<br><br>Plaintiff,<br><br>v.<br><br>The Pampered Chef, LTD.,<br><br>Defendant. | ) | Case No. 04-1314-WEB |

MEMORANDUM AND ORDER

Now before the Court is Defendant's motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3) or in the alternative Defendant's motion to transfer under 28 U.S.C. §1404 to the United States Northern District of Illinois. The Greenbrier Basket Company (GBC), a goods distributor, is suing The Pampered Chef (TPC), a vendor of kitchen related products, for a breach of contract. The Court has jurisdiction over this case under 28 U.S.C. §1332.

"Venue refers to the place where a lawsuit should be brought." *Universal Premium Acceptance Corp. v. Oxford Bank & Trust*, 277 F. Supp. 2d 1120, 1129 (D. Kan. 2003). Many courts, including those in this circuit, enforce forum selection clauses under a motion to dismiss for improper venue under 12(b)(3). *Black & Veatch Constr. Inc., v. ABB Power Generation, Inc.*, 123 F. Supp. 2d 569, 579 (D. Kan. 2000); *Riley v. Kinglsey Underwriting Agnecies, Ltd.*, 969 F.2d 953 (10th Cir. 1992). Facts outside the pleadings may be properly considered on a motion to dismiss for improper venue. See *Topliff v. Atlas Air, Inc.*, 60 F. Supp. 2d 1175, 1176-1177 (D. Kan.1999); *Argueta v. Banco Mexicano, S.A.*,

87 F.3d 320, 324 (9th Cir. 1996): Fed.R.Civ.P. 12(b). Factual disputes should be resolved in favor of the plaintiff. *M.K.C. Equip. Co. v. M.A.I.L Code*, 843 F.Supp. 679, 682 (D. Kan. 1994).

FACTS

1. On October 7, 2003, GBC entered into a business relationship with TPC, whereby, GBC would sell woven baskets to TPC. (Pl. Ex. B, Bennett Aff. ¶ 5, Def. Ex. A-1)[1].

2. On October 28, 2003, an executive sales agreement was drafted but never signed by the parties. (Pl. Ex. A, Pollock Aff. ¶ 5, Borna Aff. ¶ 7). This agreement had a forum selection clause. (Pl. Ex. A, Pollock Aff. ¶ 5).

3. There is a disputed fact as to why a sales agreement was never signed. GBC maintains that the agreement was not signed because GBC did not agree to the forum selection clause. (Pollock Aff. ¶ 5). TPC does not dispute that the agreement was never signed but states that GBC made representations that there was no problem with the forum selection clause. (Borna Aff. ¶ ¶ 7-8, Def. Ex. A-1).

4. Prior to the October 28, 2003 aborted sales agreement, GBC had accepted purchase orders from TPC. (Pl. Ex. B).

5. The ordering process would begin with TPC e-mailing GBC regarding an offer to fill an order. GBC would then go to TPC's website and fill out the purchase order using TPC's purchase order management system and would click on the "Accept P.O." button at the end of the terms and conditions

[1]Defendant has submitted three exhibit A's, one for each of the briefs filed in support of this motion. The parties are encouraged to label their exhibits consecutively keeping in mind the exhibits from earlier briefs filed with the same motion.

field. (Pollock Aff. ¶ 7, Beal Aff. ¶ ¶ 5-6, Def. Ex. A-1, B).

6. Cyndee Pollock would receive offers to purchase goods via e-mail from TPC and would tell an employee, Mark Beal, to accept these purchase orders via TPC's internet site. (Pollock Aff. ¶ 7, Beal Aff. ¶ 5-6).

7. Beal is an employee of GBC. (Beal Aff. ¶ 2).

8. Pollock is a manager at GBC. (Pollock Aff. ¶ 2).

9. There is a disputed fact regarding GBC's knowledge of the terms and conditions on the internet site where GBC accepted the purchase orders.

10. Through two affidavits, GBC denies knowing that there were terms and conditions, including a forum selection clause, on the TPC's internet acceptance site. (Pollock Aff. ¶ 9, Beal ¶ 7).

11. TPC provides evidence showing that GBC did have knowledge of the terms and conditions. TPC sent Mark Beal an e-mail with an attachment showing him how to use TPC's purchase order management system. (Bennett Aff. A ¶ 5, Def. Ex. A-1). The attachment included instructions regarding the use of the purchase order management system, including, in section four, three paragraphs under the title "Accepting and Rejecting Purchase Orders". (Def. Ex. A-1). The relevant portion of which states:

> Clicking on the Accept P.O. button will cause the terms and conditions of the purchase order to pop-up. The user should review these terms and conditions and click the Accept P.O. button at the bottom of the pop-up screen...If the purchase order is not acceptable in it's [sic] current form, the user may click on the Reject and Request Changes button. This causes a pop-up window to appear where the user may enter a free-form text describing the reason for rejecting the purchase order and request changes that would make the purchase order acceptable. (Id.)

On October 22, 2003, Cyndee Pollock sent TPC an e-mail asking TPC to change the Terms and Conditions for purchase order 58144. (Bennett Aff. ¶ 6, Def. Ex. B, B-1). Pollock requested TPC to

remove Section 14 of the Terms and Conditions, change terms to 'Letter of Credit' and change expiration date to January 2004. (Id.).

12. Clause 17 of the Terms and Conditions in TPC's purchase management order system states:

> This Purchase Order shall be deemed to have been made in Addison, Illinois USA and shall be governed by and construed in accordance with the laws of State of Illinois [sic] . The sole and exclusive jurisdiction for the purpose of resolving any dispute shall be the United States District Court, Northern District of Illinois, Eastern Division. (Def. Ex. B).

## STANDARD

Defendant alleges improper venue because of an allegedly agreed upon forum selection clause. Plaintiff does not dispute that the forum selection clause is valid. Plaintiff instead argues that the forum selection clause was never part of the parties' contract.

The application of a forum selection clause by a federal court sitting in diversity is determined under federal rather than state law. *M.K.C. Equip. Co.*, 843 F. Supp. at 682; *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28 (1988). However, to determine if the forum selection clause is a part of the parties' agreement, the Court must apply state law. *Black & Veatch*, 123 F. Supp. 2d at 577.

When exercising diversity jurisdiction, a district court applies the choice of law rules of the state in which it sits. *Id.* The choice of law rule applied by Kansas is lex loci contractus (the place of making) and Kansas courts follow the rule that the contract is made where the last act necessary for its formation is performed. *Commercial Union Ins. v. John Massman Contracting*, 713 F. Supp. 1403, 1404-0405 (D. Kan. 1989). Plaintiff accepted the contract when Beal clicked on the 'Accept P.O.' button in Kansas.

Kansas choice of law rules also allow for the enforcement of a choice of law clause in a contract. *Black & Veatch*, 123 F. Supp. 2d at 577. Clause 17 of the terms and conditions in TPC's purchase order

management system contains a choice of law provision to apply Illinois law; however, it is these very terms and conditions which plaintiff denies are a part of the parties' contract. Therefore, the Court will apply Kansas law to determine this narrow question.

## TERMS OF THE CONTRACT

Because this case involves the sale of goods, the Court will apply Article 2 of the UCC to determine the terms and conditions of the parties' agreement. K.S.A. §84-2-102.

"An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." KSA §84-2-206. The UCC does not define what constitutes an offer so the Court must look to the common law rules. See K.S.A.§84-2-206(Kansas comment); K.S.A.§84-1-103 (unless displaced by the UCC, common law supplements UCC provisions). An offer is an expression of a willingness to enter into an agreement and must reasonably lead the offeree to believe that a power to create a contract has been conferred upon him. *Kansas Power & Light Co. v. Burlington N.R.Co.,* 740 F.2d 780, 786 (10th Cir. 1984).

TPC's e-mails containing purchase order information constituted an offer to buy baskets. The e-mails consisted of information about the quantity of baskets to be bought, price, shipment information and delivery dates. None of the e-mails had any forum selection clause; however, they did state a specific manner of acceptance:

1. Upon receipt of order, please acknowledge via internet at [website]. By acknowledging this P.O.[purchase order], you also acknowledge the terms and conditions of this P.O.

2. To accept this P.O. via internet, visit [website].

The evidence shows at least nine such e-mail offers. (Pl. Ex. B). GBC consistently went to the TPC website to accept these offers. (Pollock Aff. ¶ 6, Beal Aff. ¶ 6).

GBC makes several arguments, without supporting case law, that the forum selection clause should not be part of the parties' contract. None of these arguments dispute when acceptance was made.

Plaintiff first argues that the e-mail offers are ambiguous because it did not alert GBC to the forum selection clause that had to be accepted on the website. "Whether ambiguity exists in an instrument is a matter of law to be decided by the court." *Mobile Acres, Inc. v. Kurata*, 211 Kan. 833, 839 (1973). The TPC e-mails state that the way to acknowledge (ie. accept) the purchase order was to go to the website. See K.S.A. §84-2-206(An offer to make a contract shall be construed as inviting acceptance in any manner). The e-mail is not ambiguous as it also alerted GBC that there were terms and conditions associated with acknowledging the P.O. on the website.

GBC next argues that it should not be held to the terms and conditions accepted on the website because plaintiff thought that the e-mails' terms and conditions were all inclusive.

> "It is a well-established rule of law that contracting parties have a duty to learn the contents of a written contract before signing it, and such duty includes reading the contract and obtaining an explanation of its terms. *Sutherland v. Sutherland,* 187 Kan. 599 (1961). The negligent failure of a party to read the written contract entered into will estop the contracting party from voiding the contract on the ground of ignorance of its contents. *Rosenbaum v. Texas Energies,* Inc., 241 Kan. 295 (1987). Therefore, a party who signs a written contract is bound by its provisions regardless of the failure to read or understand the terms, unless the contract was entered into through fraud, undue influence, or mutual mistake. *Id*." *Albers v. Nelson,* 248 Kan. 575, 578-579 (1991).

"A cardinal rule in the construction of contracts is to ascertain the intention of the parties and to give effect to that intention." *Mobile Acres*, 211 Kan. at 838.

In determining intent to form a contract, the test is objective, rather than subjective, meaning that

> the relevant inquiry is the 'manifestation of a party's intention, rather than the actual or real intention.' Put another way, 'the inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract. *Southwest and Associates, Inc. v Steven Enterprises, LLC*, 88 P.3d 1246, 1249 (Kan. Ct. App. 2004).

This was a website that required action on the part of GBC. Plaintiff objectively agreed to the forum selection clause by scrolling through the terms and conditions and clicking on the 'Accept P.O.' button. Plaintiff's subjective beliefs that it was the e-mail and not the website terms and conditions that governed the contract are both misplaced and irrelevant. Plaintiff was under a duty to read and understand the terms and conditions prior to clicking the 'Accept P.O.' button as this was the formal acceptance required by TPC's offer to purchase baskets. See K.S.A. §84-2-206. Failure to read or understand the terms and conditions is not a valid reason to render those provisions nugatory. *Rosenbaum*, 241 Kan. at 295.

Plaintiff next argues that the forum selection clause should not be read into the contract because GBC rejected an Exclusive Sales Agreement containing such a clause. Plaintiff claims that the failure to sign this agreement shows that they did not intend that a forum selection clause be part of the contract.

The evidence shows that the Exclusive Sales Agreement was discussed on October 28, 2003. (Pl. Ex. A). The date of the first e-mail inviting GBC to accept a purchase order was October 7, 2003. (Pl. Ex. B). Plaintiff's subjective reasons for refusing to sign the Exclusive Sales Agreement are irrelevant as GBC consistently agreed, in an objective manner prior to the Exclusive Sales Agreement, to contracts with the terms and conditions on TPC's website. The Court will not alter the plain terms in the parties' contract because GBC refused to sign the Exclusive Sales Agreement.

Plaintiff also argues that there was no meeting of the minds regarding the forum selection clause on the website. A meeting of the minds requirement is proved when the evidence shows with reasonable

definiteness that the minds of the parties met upon the same matter and agreed up on the terms of the contract. *Steele v. Harrison*, 220 Kan. 422, 428 (1976). Part of clause 17 states 'each shipment received by Buyer from Seller shall be deemed to be only upon the terms and conditions as set forth in this Purchase Order...". (Def. Ex. A). GBC agreed upon these terms and conditions published on TPC's website by clicking the "Accept P.O." button and this satisfied the meeting of the minds standard.

Finally, in an argument supported by no case law, plaintiff argues that Mark Beal had no authority to bind GBC to any terms and conditions. Plaintiff is reminded that legal contentions must be warranted by existing law and must not be frivolous. Fed.R.Civ.P. 11.

It is a general rule of agency that a principal is liable to third parties for the acts and contracts entered into by his agent when that principal has conferred upon the agent express authority for such activities. *Greep v. Bruns*, 160 Kan. 48, 55 (1945). Beal had express authority to accept the purchase order on TPC's purchase order acceptance system because he was specifically directed to do so by Pollock, his supervisor and GBC manager. (Pollock Aff. ¶ 7, Beal Aff. ¶ ¶ 4-6). As this was within Beal's scope of employment duties, his acceptance of the terms and conditions on the TPC website bound GBC.

The Court holds that the forum selection clause in the terms and conditions on TPC"s website are a part of the parties' contract.

FORUM SELECTION CLAUSE

The Supreme Court has stated that forum selection clauses are prima facie valid and should be enforced unless a party can show it is unreasonable under the circumstances. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 6 (1972); *K & V Scientific Co., Inc. v. Bayerische Motoren Werke*

*Aktiengese...,* 314 F.3d 494, 498 (10th Cir. 2002). GBC has failed to show that enforcement of the forum selection clause would be unreasonable.

Forum selection clauses can be classified as either mandatory or permissive. *K & V Scientific Co.*,, 314 F.3d at 498. "Mandatory forum selection clauses contain clear language showing that jurisdiction is appropriate only in the designated forum. *Excell, Inc. v. Sterling Boiler & Mech., Inc.,* 106 F.3d 318, 321 (10th Cir. 1997). "In contrast, permissive forum selection clauses authorize jurisdiction in a designated forum, but do not prohibit litigation elsewhere." *Id.* "The use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made." *Milk 'N' More, Inc. v. Beavert,* 963 F.2d 1342, 1346 (10th Cir. 1992).

The forum selection clause in this case states, "The sole and exclusive jurisdiction for the purpose of resolving any dispute shall be the United States District Court, Northern District of Illinois, Eastern Division." (Def. Ex. B). This is a mandatory clause as it designates an exclusive forum and uses the word 'shall'.

Because the forum selection clause is a part of the contract and it is valid, a Kansas venue is improper. "When venue is improper, the court may, in the interests of justice, transfer the case to a district court in which it could have been brought." *United States ex rel. Tech Coatings v. Miller-Stauch Construction,* 904 F. Supp. 1209, 1214 (D. Kan. 1995); 28 U.S.C. §1406(a); 28 U.S.C. §1404. While both dismissal and transfer are available under 28 U.S.C. §1406(a), transfer is the preferred course. *Id.*

Courts generally use the standards under 28 U.S.C. §1404 to evaluate transfers pursuant to a forum selection clause. *Stewart Org.*, 487 U.S. at 28; *Black & Veatch*, 123 F. Supp. 2d at 580. "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer

according to an individualized case-by-case consideration of convenience and fairness." *Stewart Org.*, 487 U.S. at 29(citations omitted). This Circuit evaluates §1404 transfers under the following standard:

> Among the factors [a judge] should consider is the plaintiff's choice of forum; the accessibility of witnesses and the other sources of proof; including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; question as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical. *Texas Gulf Sulfur Co. v. Ritter*, 371 F.2d 145, 147 (10th Cir. 1967).

However, a forum selection clause will "be a significant factor that figures centrally in the district court's calculus" in a motion to transfer. *Stewart Org.*, 487 U.S. at 29. This Circuit generally gives deference to forum selection clauses except in cases showing an inconvenience so serious as to foreclose a remedy, bad faith, overreaching or lack of notice. *Riley*, 969 F.2d at 958; See also *M.K.C*, 843 F. Supp. at 682; *Black & Veatch*, 123 F. Supp. 2d at 581(A venue mandated by a choice of forum clause will usually outweigh the deference normally given to plaintiff's choice of forum). Plaintiff neither argues this issue nor claims any inconvenience, lack of notice or bad faith.

Considering all of the factors and arguments, the Court holds that the case should be transferred to the United States District Court for the Northern District of Illinois.

It is ORDERED that Defendant's Motion to Dismiss due to improper venue (Doc. 10) be DENIED;

It is further ORDERED that the case be TRANSFERRED in accordance with 28 U.S.C. §1406(a) to the United States District Court for Northern District of Illinois, Eastern Division;

It is further ORDERED that Defendant's motion requesting transfer pursuant to 28 U.S.C. §1404(a) be DENIED as moot.

SO ORDERED this 12th day of January 2005.

s/ Wesley E. Brown

Wesley E. Brown, U.S. Senior District Judge